In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 754

THE STATE OF TEXAS, THE STATE OF LOUISIANA, RAILROAD COMMISSION OF THE STATE OF TEXAS, ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment entered on January 26, 1949, by a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on March 23, 1949, and appeal papers served on March 28, 1949.

The Commission's order, dated May 25, 1948,[1] prescribed certain rail rates on dense soda ash, a commodity used in the manufacture of glass. Soda ash produced at Corpus Christi, Texas, and at Lake Charles and North Baton Rouge, Louisiana, is used by glass manufacturers located at Palestine and Waco, Texas, and at Shreveport, Louisiana. The same commodity is also used by glass manufacturers in Oklahoma and Arkansas who compete with those in Texas and Louisiana. Complaint was made to the Interstate Commerce Commission by the Corporation Commission of the State of Oklahoma and the Arkansas Public Service Commission, on behalf of the glass manufacturers in those States, complaining that the rates on soda ash from the producing points in Texas and Louisiana to the points in Oklahoma and Arkansas where glass is manufactured were too high in comparison with the rates from the same producing points to the points in Texas and Louisiana where competing glass manufacturers are located. The Commission's order found violations of Sections 1, 3, and 13 of the Interstate Commerce Act, as amended,[2] and prescribed a reduction in the interstate rates to Oklahoma and Arkansas points,[3] as well as an increase in the rates to Texas

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[1] The Order of May 25, 1948 (Exhibit "F" to complaint), was made pursuant to, and put into effect conclusions reached in, the Commission's report and order of March 3, 1947 (Exhibit "D" to complaint, 268 I.C.C. 195). Petition for reconsideration of the latter order was denied on September 4, 1947 (Exhibit "E" to complaint). No petition for reconsideration of the Order of May 25, 1948, was ever filed with or passed upon by the Commission.

[2] 49 U.S.C. 1, 3, and 13.

[3] Appellants do not attack this reduction. An interstate basic rate of 31 cents (the rate to St. Louis) was prescribed to Fort Smith, Arkansas, and to Ada, Blackwell, Henryetta, Okmulgee, Poteau, Sand Springs, and Sapulpa, Oklahoma, and

and Louisiana points from Texas and Louisiana shipping points.[4]

Appellants' suit attacked the Commission's order insofar as it required an increase in the intrastate rates.[5] The District Court, in an opinion by Circuit Court Judge Murrah, rendered on January 26, 1949, upheld the Commission's order.

Appellees submit that this appeal involves no substantial questions. The points set forth in appellants' Jurisdictional Statement, insofar as relevant,[6] raise no issue other than the sufficiency of the evidence in the record to support the Commission's order. A second judicial scrutiny of the record to determine the adequacy of evidence to sustain a rate order made by an administrative agency would be a burdensome exercise of appel-

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points grouped therewith. Basic rates 4 cents higher than the existing basic rates from the producing points to Palestine and Waco, Texas, and Shreveport, Louisiana, were prescribed.

[4] The rates to be increased, being those from Texas and Louisiana producing points to Texas and Louisiana glass manufacturing points, are intrastate or interstate, as the case may be, according to the respective origins and destinations concerned. For convenience, however, we shall refer to these as the "intrastate rates."

[5] Appellants disclaimed at the trial any attack on that part of the order requiring reduction in the interstate rates to Oklahoma and Arkansas. A suit to set aside a Commission order may attack the order "in whole or in part." 28 U.S.C. 41 (28).

[6] The first two points enumerated by appellants relate to the reasonableness of the rates. As the District Court stated, that issue does not arise in this case. Appellants' third point alleges that the Commission's decision rests solely upon disparity between the intrastate and interstate rates. But, as the District Court pointed out, "The Commission's order in this case explicitly recognizes that disparity alone between particular rates on intrastate and interstate traffic does not empower it to prescribe intrastate rates." Appellants' remaining points deal with the alleged insufficiency of the evidence before the Commission to prove substantial injury to persons or localities in interstate commerce.

late review not called for in the interest of orderly and efficient administration of justice.

The Commission's legal authority to make an order prescribing intrastate rates which will eliminate undue prejudice against Oklahoma and Arkansas glass manufacturers is clear, and the order is unquestionably valid if the Commission's finding of undue prejudice against such manufacturers is supported by substantial evidence.[7]

Intrastate rates are subject to federal regulation when necessary to prevent undue prejudice against persons or localities in interstate commerce. This has been settled law since the well known *Shreveport* case, *Houston East and West Texas Railway Company* v. *United States*, 234 U.S. 342. Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4),[8] under which the Commission acted in the case at bar, has been described as a codification of the rule in the *Shreveport* case. *North Carolina*

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[7] The requirement of "a high standard of certainty" and "clear findings, supported by evidence, of each element essential to the exercise of" the Commission's power (*North Carolina* v. *United States*, 325 U.S. 507, 511) is met in this case.

[8] That provision reads as follows:

> Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes [a] *any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand*, or [b] any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected

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v. *United States*, 325 U.S. 507, 513. It will be noted that Section 13(4) deals with two types of situations authorizing the Commission to regulate intrastate rates. The first is the case of undue preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. This is the type of situation involved here. The second is the case of undue discrimination against interstate or foreign commerce as such. The distinction between the two types of situation is made plain in the passages marked (1) and (2) in the majority opinion in *North Carolina* v. *United States*, 325 U.S. 507, 510. In the *North Carolina* case there was no evidence in the record of competitive disadvantage or injury to any particular persons or localities, other than such as might be inferred from the mere fact that the intrastate and interstate rates were not identical. The primary issue in that case, and the issue as to which the dissenting justices were in disagreement with the majority of the Court, was whether a discrimination against interstate commerce as such had been proved, by showing that intrastate traffic was not producing its fair proportionate share of the

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thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. [Italics and letters in brackets supplied.]

As shown by the divisions into [a] and [b] inserted in the above quotation, the statute recognizes two types of situations in which the Interstate Commerce Commission is empowered to prescribe intrastate rates. In the case at bar we are concerned only with situation [a], where there is an undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. We are not concerned with discrimination against interstate commerce as such, which is also declared unlawful by the above-quoted section in the language designated as [b].

cost of maintaining an adequate and efficient national railway system. See 325 U.S. at 514, *et seq.; Wisconsin Railroad Comm.* v. *C., B. & Q. Railroad Co.,* 257 U.S. 563, 586; *Florida* v. *United States,* 282 U.S. 194, 211.

But there is no problem involved in the case at bar with respect to the adequacy of railroad revenues, or the justification of a State-wide increase in intrastate rates in order to furnish a fair share of the necessary revenues in order to prevent a burden upon interstate commerce as such.

For this reason the orders made by the State commissions of Texas and Louisiana are beside the point. Their findings that the present intrastate rates are amply compensatory and contribute adequately to the carriers' revenue needs (and thus do not burden interstate commerce as such) are irrelevant considerations in this type of case. Nor was the Interstate Commerce Commission required to investigate and make findings as to these issues. It was sufficient that it considered the reasonableness of the intrastate rates "*in their relation* to the rates to complaining points in Arkansas and Oklahoma."[9] A rate within the zone of reasonableness may be unlawful if it results in undue prejudice. *New York* v. *United States,* 331 U. S. 284, 344; *Ayrshire Collieries Corp.* v. *United States,* 335 U. S. 573, 594.

We are dealing in the case at bar with a situation precisely like that in the *Shreveport* case, where direct injury to particular persons and localities in Oklahoma and Arkansas is shown to result from the competitive disadvantage to which they are subjected in the sale of their glass products in a

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[9] See Ex. G to complaint, p. 5. Italics supplied.

common market, as a result of the rate discrimination practiced against them and in favor of their Texas and Louisiana competitors in respect of the inbound freight rates on soda ash, an indispensable raw material for their industrial operations.

The Commission's findings, and the evidence of record, plainly show that the Oklahoma and Arkansas glass manufacturers are victims of a substantial competitive disadvantage which operates to their detriment and to the benefit of their Texas and Louisiana rivals. The substantial character of the disadvantage is shown by the clear testimony that soda ash is an indispensable and important raw material for the manufacture of glass (Tr. 102). The Commission in its very thorough and painstaking report included a table (268 I.C.C. at 199) showing the substantial tonnage of this material used by the complaining manufacturers.

A witness from one of the complainants located at Ft. Smith testified that his company is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1% of its inbound materials in weight and about 50% in cost (excluding cullet or scrap glass), as contrasted with silica sand which constitutes 38.5% in both weight and cost (Tr. 34-35).

The testimony of another witness, Vice-President of the Kerr Glass Manufacturing Corporation at Sand Springs, Oklahoma, shows that soda ash amounts to 25% in weight of the raw materials used by that company, and amounts to 50 to 60% of the cost of raw materials used (Tr. 15-16).

That the glass manufacturers who are the victims, and those who are the beneficiaries, of the rate disparity are in active competition, selling

their products in the same market, is likewise established beyond dispute by the evidence of record.

The witness John Bernior, an officer of the company at Sand Springs, testified that his company serves the territory west of the Mississippi River and east of the Rocky Mountains in competition with products from Palestine and Waco (Tr. 16).[10] In this witness' judgment, the higher rate on so important a raw material "puts us at a very great disadvantage" (Tr. 16).

A witness from Ft. Smith testified that his company sells flat window glass in competition with Shreveport. His competitors there have a lower rate, and this disparity places his company under "an enormous handicap" (Tr. 34-35).

The witness D. C. Hamilton, of the Bartlett-Collins Company of Sapulpa, manufacturing a low-cost grade of tableware, anticipated potential competition[11] from Waco and Palestine, because although the plants there were manufacturing other articles, it would be simple to change the moulds and go into production of glass tumblers in a few days (Tr. 114-115). The witness' company at the time of the hearing had a surplus of orders on hand (Tr. 121). He testified regarding the lower rates

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[10] This company does not experience competition from Shreveport, as its product is not manufactured there (Tr. 32).

[11] Under Section 3(1) of the Act, as amended in 1940, to extend the prohibition against discriminations by adding the words "region, district, territory" as subjects of protection against the unlawful practices of carriers (*New York* v. *United States*, 331 U.S. 284, 297-300), the Commission would doubtless have had power to eliminate discriminations detrimental to the potential industrial development of Oklahoma and Arkansas. See *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 431, 444, 450-451. But in fact the Commission (as shown by Note 4 in its report) excluded all such merely potential competition from the scope of its findings under Sections 3 and 13 of the Act.

enjoyed by eastern competition in so-called "Official Territory" (Tr. 123-124).

Appellants argue here, as they did before the Commission and the District Court, that a sufficient showing of injury has not been made in the absence of proof that specific sales or shipments have been lost by complainants as a result of the rate disparity. This contention obviously embodies too narrow a concept of "injury." When substantial competition between the victims and beneficiaries of the rate disparity is shown, as well as the substantial character of the disadvantage resulting from the rates with respect to an essential raw material amounting to approximately half the cost of ingredients used in manufacture, the necessary requirement of showing injury proximately caused by the rate discrepancy is satisfied. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37.

Even if it were a fact (which is not shown by the record) that due to wartime conditions all the complaining manufacturers were able to dispose profitably of their entire production of glass (as the witness Hamilton testified with respect to the Sapulpa manufacturer of tableware (Tr. 121, *supra*)), it would nevertheless remain true that the Oklahoma and Arkansas manufacturers were suffering a competitive injury resulting from the disadvantageous rate relationship.

The fact that such injury might be nullified or overcome by other factors arising from wartime demand would not justify continuance of the rate disparity producing the injury. The disadvantageous competitive relationship, injurious to complainants and preferential to their Texas and Louisiana competitors, would continue to produce its full effects. The fortuitous circumstance that such

effects might be neutralized to some extent by other extraneous conditions would not justify continued maintenance of the discriminatory rates. The fact that the injured parties merely received diminished profits instead of being forced out of business as a result of the prejudicial rates would be no justification for the continuance of such an unwarranted competitive handicap.

On this subject the Commission used the following language:

> As stated by the intervening manufacturers, in order to establish unlawful person-locality preference and prejudice within the meaning of section 3 or 13 of the act, it must not only be shown that there is an unjustified disparity in rates from a transportation standpoint, but that there is substantial competition between the complaining parties and those alleged to be preferred so that the rate disparity may be said to result in disadvantage to the former and corresponding advantage to the latter. Complainant must show that shipments have been or will be made or prevented or that complainant has been or will be otherwise injured because of the rate disparity. We are here dealing with rates on an inbound raw material. In the nature of things the exact effect on the marketing of the finished product can not be shown. The language of sections 3 and 13 is broad and contains sweeping prohibitions against every form of undue prejudice, preference, advantage, or disadvantage, or unjust discrimination, as between persons and localities. There is real, substantial, and unwarranted disparity in the inbound rates on soda ash, an important raw material in the manufacture of glass, and there is keen competition in the sale of the finished products between the complaining manufacturers who are subjected to the relatively high rates and those at Pales-

tine, Waco, and Shreveport who are accorded the relatively low rates. Such rate disparity results and will result pro tanto in depriving the complaining manufacturers of that fair opportunity to which the law entitles them. [268 I.C.C. at 203.]

With respect to the competitive situation, the Commission found as follows:

The following is a summary of the competitive situation as disclosed by the record, insofar as material to this proceeding. One of the complaining manufacturers at Fort Smith makes window glass and markets its product west of the Mississippi River and in portions of Tennessee, Mississippi, Alabama, Georgia, Florida, and Illinois in competition with the manufacturer at Shreveport. It obtains its soda ash from Lake Charles and Corpus Christi, and is severely handicapped by its relatively high rates on soda ash, which constitutes 10.1 per cent of its inbound materials in weight and about 50 per cent in cost (excluding cullet), as contrasted with silica sand, which constitutes 38.5 per cent of its inbound materials in both weight and cost. Complaining manufacturers who produce and ship window glass, in competition with the Shreveport intervener, are located also at Henryetta and Okmulgee. The complaining manufacturer at Sand Springs makes glass jars and jelly glasses, markets its products west of the Mississippi River and east of the Rocky Mountains in competition with manufacturers at Palestine, Waco, Jackson, and Alton, and is severely handicapped by its relatively high rates on soda ash, which it obtains from North Baton Rouge and Corpus Christi and which constitutes about 25 per cent of its inbound raw material in weight and from 50 to 60 per cent in cost. Complaining manufacturers who

> produce and ship glass containers, in competition with the Palestine and Waco interveners, are located also at Ada, Blackwell, Okmulgee, Poteau, and Sapulpa. [268 I.C.C. at 199.]

Appellants may argue that the Commission should have reduced the interstate rates to the intrastate level in order to remove the disparity in relationship between them. To this it may be answered in the first place that, as held in the *Shreveport* case, the judgment as to what will constitute a reasonable level of interstate rates must be determined exclusively by the federal authority. When such a determination has been made, it is the intrastate rates which must be modified to bring about a non-discriminatory relationship. In the second place, the Commission was justified in giving appropriate weight to the contentions of the carriers that the intrastate rates on soda ash were unduly low, as a result of several factors. There was testimony that these rates were maintained at a low level because the producers wanted to compete with Official Territory (Tr. 262). There was also testimony indicating that the low rates on dense soda ash (the type used by glass manufacturers) were maintained because of inadvertent classification. Light soda ash, a commodity used by paper manufacturers, and not competitive with dense soda ash which is used for a different purpose, was given a low rate because it is used by a paper manufacturer at West Monroe, Louisiana, where water transportation is available. Because of a tariff rule requiring that the rate to intermediate points should be no higher than the rate to a more distant point, the West Monroe water-compelled rate on *light* soda ash was inadvertently made applicable to the intermediate points where *dense* soda ash

was consumed by glass manufacturers at Shreveport and Palestine (Tr. 365, 437).

In any event, appellants cannot prevail in the present action, for they have failed to comply with a statutory condition precedent to bringing suit. They have not exhausted their administrative recourse, as required by Section 17(9) of the Interstate Commerce Act (49 U.S.C. 17(9)).[12]

The order which this suit seeks to set aside was issued by Division 3 of the Interstate Commerce Commission on May 25, 1948. This order, supplementing a prior order of the Commission, was limited to certain intrastate rates on dense soda ash in Texas and Louisiana. It required the respondent railroads to cease and desist from practicing the unjust discrimination, undue prejudice and preference found to exist by the Division in its report of March 3, 1947, in the relation between these intrastate rates on dense soda ash and interstate rates on like traffic, and to establish the intrastate rates prescribed in its report of March 3, 1947.[13] From this order of May 25, 1948, no petition for rehearing, reargument, or reconsideration

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[12] It is there provided:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it *shall have been made and shall have been denied*, or after rehearing, reargument, or reconsideration otherwise disposed of, *by the Commission* or an appellate division, *a suit* to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, *may be brought in a court* of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, *but not otherwise*. (Italics supplied.)

[13] Appendix "F," pages V-VI, of the complaint.

was ever addressed to or passed upon by the entire Commission.[14]

The provisions of Section 17(9) are clear and unambiguous. They require as a condition precedent to the institution of a suit to set aside an order of the Commission the submission of the controversy to the entire Commission or an appellate division thereof [15] for final decision. This requirement is an integral part of the statutory scheme of procedure embodied in Section 17. There is here present a jurisdictional defect which cannot be waived. Compare *Industrial Addition Ass'n* v. *Commissioner,* 323 U. S. 310, 313; *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 453; *United States* v. *Griffin,* 303 U. S. 226, 229.[16]

Furthermore, this failure of plaintiffs to exhaust their administrative recourse cannot be classed as a mere "technical" defense. Following the action

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[14] Appellants make no allegation in their complaint that the order of May 25, 1948, was ever made the subject of petition to the entire Commission for rehearing, reargument, or reconsideration, or that such a petition was ever denied by it. This omission is not a mere defect in pleading, since no such petition in fact had been filed or denied by the Commission as a whole.

[15] No appellate division has been established; but the full Commission passes upon petitions for rehearing, reargument, or reconsideration.

[16] The District Court for the District of Utah, Central Division, in *Idaho* v. *United States,* Equity No. 439, dismissed for lack of jurisdiction a suit brought by the State of Idaho to annul and set aside an order of the Commission authorizing the abandonment of a branch line of railroad. In its Findings and Decree, April 17, 1943, not reported, the court held "That section 17(9) of the Interstate Commerce Act requires, as a condition precedent to the institution of a suit under the Urgent Deficiencies Act, a denial of a petition for rehearing, reargument, or reconsideration by the full Commission or an appellate division thereof, as provided in section 17(6) of said Act" and "that the filing of this suit was unauthorized and forbidden by law." Later a second suit was brought in the same court (Civ. No. 503) in which the Commission's order was upheld on August 9, 1943, 12 I.C.C.P.J. 916.

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of Division 3, of March 3, 1947, and its affirmance by the Commission's order of September 4, 1947 (Exhibit "E" of the complaint), both the Railroad Commission of Texas and the Louisiana Public Service Commission denied the participating rail carriers the right to put into effect the lower intrastate rates which the Commission had found would remove the prejudice against interstate traffic of the complaining manufacturers. A petition for reconsideration would have given the full Commission an opportunity to reexamine its order in the light of these pronouncements made by the State authorities. Resort to the procedure required by Section 17(9) would therefore have been more than a perfunctory step. It would not only have afforded the Commission opportunity to refute the position taken by the States of Louisiana and Texas, or to revise its own conclusions, as the case might be, but such action by the full Commission might also have facilitated the task of the reviewing courts by throwing additional light upon the questions at issue affecting the determination of the validity of the order involved.

It is submitted that the Commission's order in the case at bar is plainly sustained by clear findings and supported by evidence of each element essential to the exercise of the Commission's power over intrastate rates in order to prevent undue prejudice against persons or localities in interstate commerce, namely, the Oklahoma and Arkansas glass manufacturers who are injured by the prejudicial intrastate rates and placed at a substantial disadvantage in the marketing of their products in competition with Texas and Louisiana glass manufacturers who are beneficiaries of those rates. In any event, appellants cannot prevail in this

action since they did not comply with a statutory condition precedent to bringing suit.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General;
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

APRIL 12, 1949.

Copies of this motion to affirm were mailed to counsel for appellants and counsel for all other parties, by the Attorney General's office, Washington, D. C.

ROBT. E. SHELTON.

Endorsed: Filed in District Court on April 12, 1949.

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